No. 80-1041

In the Supreme Court of the United States

OCTOBER TERM, 1980

VIRGIL R. RIZZO, PETITIONER

v.

THOMAS L. DAVIS, DISTRICT DIRECTOR,
INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner seeks review of the decision below holding that his suit to enjoin the collection of income taxes assessed against him for 1970 and 1973 was barred by the Anti-Injunction Act (26 U.S.C. 7421(a)).

The pertinent facts may be summarized as follows: During 1973, petitioner worked as a physician in Plantation, Florida (A. 59, 85).[1] The Internal Revenue Service received his individual tax return for that year on November 13, 1974 (A. 5). On April 17, 1975, the Internal Revenue Service received an amended return for petitioner's 1970 tax year (A. 80). Petitioner listed his name and address on both returns as Virgil R. Rizzo, Post Office Box 237, Warrendale, Pennsylvania 15086 (A. 80; Pet. App. B-3, B-5).

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[1] "A" refers to the record appendix filed in the court of appeals.

Some time thereafter, the Internal Revenue Service commenced an investigation of petitioner for 1971-1975. Petitioner accordingly filed a power of attorney with the Service appointing E. Louis Fields, of Fort Lauderdale, Florida, as his attorney to represent him in all matters relating to the investigation. The power of attorney was dated April 4, 1977, and listed petitioner's name and address at the top of the form as Virgil R. Rizzo, M.D., Post Office Box 14611, Fort Lauderdale, Florida, 33302 (A. 37). At the time that petitioner signed this power of attorney, he was living in Fort Lauderdale, Florida (Pet. App. B-4 to B-5).

Pursuant to audits made in connection with its investigation, the Internal Revenue Service determined deficiencies against petitioner for 1970 and 1973. On October 20, 1977, the Service sent two statutory notices reflecting those deficiencies to petitioner by certified mail at the Fort Lauderdale, Florida address set forth on the power of attorney form (A. 25, 30; Pet. App. B-3). These certified letters were subsequently returned to the Internal Revenue Service because they were never claimed by the addressee (A. 29, 34). On March 8, 1978, the Internal Revenue Service assessed petitioner for the deficiencies determined against him for those years (A. 10; Pet. App. B-2).

Petitioner thereupon instituted this suit in the United States District Court for the Western District of Pennsylvania seeking to enjoin collection with respect to the tax assessments for 1970 and 1973. Petitioner alleged that the assessments were illegal (and hence subject to injunction under Section 6213(a) of the Internal Revenue Code of 1954) because the notices of deficiency for those years had not been sent to his last known address and were therefore invalid. After finding that the notices of deficiency were validly mailed to petitioner's last known address, the district court dismissed the suit as prohibited by the Anti-Injunction Act (26 U.S.C. 7421(a)) (Pet. App. B-1). The court of appeals affirmed (Pet. App. A-1).

The decision below correctly held that the Anti-Injunction Act barred petitioner's suit. That statute generally provides that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person. As this Court noted in *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 6 (1962), the effect of the statute is to deprive the courts of jurisdiction over such actions unless they fall within one of the specific statutory exceptions or unless the plaintiff can show (1) that under no circumstances can the government prevail on the merits of its claim, and (2) that he has no adequate legal remedy. Here, petitioner has failed to meet either prong of this test. First, he has not shown that the government would not ultimately be entitled to prevail on the merits of the assessment. Second, petitioner has an adequate legal remedy because he may pay the assessment and bring a refund suit in the district court.

Nor does this case fall within any of the specific statutory exceptions to the Anti-Injunction Act. Section 6213(a) of the Internal Revenue Code of 1954 generally prohibits the assessment and collection of a deficiency before the issuance of a statutory notice of deficiency and the expiration of the time allowed under the statute for the filing of a petition with the Tax Court for a redetermination of the deficiency. But the assessments in this case were not made during the prohibited period referred to in Section 6213(a). Here, the Service mailed notices of deficiency to petitioner on October 20, 1977, and waited until the time had expired for filing a petition with the Tax Court before assessing those deficiencies on March 8, 1978.

Petitioner, however, contends (Pet. 8-11) that the notices of deficiency mailed to him on October 20, 1977, were invalid because they were not mailed to his "last known address" under Section 6212(b)(1) of the Code. Under that provision, a notice of deficiency, if mailed to a taxpayer's last known address, is valid, even though it is not actually

received by the taxpayer. *Berger* v. *Commissioner*, 404 F. 2d 668, 673 (3d Cir. 1968), cert. denied, 395 U.S. 905 (1969); *Wilson* v. *Commissioner*, 564 F. 2d 1317, 1319 (9th Cir. 1977); *United States* v. *Ahrens*, 530 F. 2d 781 (8th Cir. 1976); *Cataldo* v. *Commissioner*, 60 T.C. 522, 524 (1973), aff'd per curiam, 499 F. 2d 550 (2d Cir. 1974). While the term "last known address" is not defined in the Internal Revenue Code, the courts of appeals have uniformly held that it is the address where the Commissioner reasonably believed the taxpayer wished to be reached. *Delman* v. *Commissioner*, 384 F. 2d 929, 932 (3d Cir. 1967), cert. denied, 390 U.S. 952 (1968); *Berger* v. *Commissioner*, 404 F. 2d 668, 671 (3d Cir. 1968), cert. denied, 395 U.S. 905 (1969) *Sorrentino* v. *Ross*, 425 F. 2d 213, 215 (5th Cir. 1970); *United States* v. *Ahrens*, 530 F. 2d 781, 785 (8th Cir. 1976); *Alta Sierra Vista, Inc.* v. *Commissioner*, 62 T.C. 367, 375 (1974), aff'd, 538 F. 2d 334 (9th Cir. 1976); *Kennedy* v. *United States*, 403 F. Supp. 619, 623 (W.D. Mich. 1975), aff'd, 556 F. 2d 581 (6th Cir. 1977).

Here, the facts strongly support the district court's conclusion that the Commissioner acted reasonably in sending the notices of deficiency to petitioner's Florida address. While petitioner did list his Pennsylvania address on his 1973 tax return, it was altogether reasonable for the Commissioner to believe that petitioner wished the deficiency notices sent to his Florida, rather than his Pennsylvania, address, because petitioner lived and worked in Florida during the relevant period, and listed a Florida address on the power of attorney form signed by him in 1977. The fact that petitioner failed to claim the notice, sent to him by certified mail, cannot serve to invalidate the notice which was directed to his actual address.

Petitioner's contention (Pet. 11-13) that he was deprived of due process because he did not actually receive the deficiency notices is also without merit. Persons who do not

receive actual notice of the Commissioner's deficiency determinations are not denied their right to challenge the Commissioner's assertions of liability. As this Court pointed out almost 50 years ago in *Phillips* v. *Commissioner*, 283 U.S. 589, 597 (1931), a person in such circumstances remains free to pay the tax, file claims for refund, and, if those claims are denied, to bring refund suits in the district courts or the Court of Claims. In *Phillips*, the Court held that the availability of these separate refund suits meets the requirements of due process without regard to the availability of the alternative procedures Congress has established. Accord: *Cohen* v. *United States*, 297 F. 2d 760, 772 (9th Cir.), cert. denied, 369 U.S. 865 (1962); *Brown* v. *Lethert*, 360 F. 2d 560, 562 (8th Cir. 1966); *Drake* v. *Commissioner*, 554 F. 2d 736, 739 (5th Cir. 1977); *Wilson* v. *Commissioner*, 564 F. 2d 1317, 1319 (9th Cir. 1977).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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